SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY CRIMINAL TERM : PART-95

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THE PEOPLE OF THE STATE OF NEW YORK

Ind. No.: 3981/04

-against-

DECISION & ORDER

CECIL JONES,

Defendant.

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DANIEL P. CONVISER, J.:

The Defendant moves to be resentenced pursuant to the Drug Law Reform Act of 2009 (the "2009 DLRA" or "2009 Drug Law Reform Act", Chapter 56 of the Laws of 2009, codified at CPL 440.46). That motion is opposed by the People. For the reasons stated below, Defendant's motion is granted and the Defendant is hereby offered a new determinate sentence of 3 ½ years in prison followed by 3 years of post-release supervision for each of the two counts he is seeking resentencing for. Those new sentences would be served concurrently. With respect to both of the offered resentences, the Defendant would receive a credit against the new prison and post-release supervision term for all of the time the Defendant has already been incarcerated in jail or prison pursuant to his existing concurrent sentences. On the adjourned date on this matter, the Defendant may withdraw his resentencing application or alternatively indicate that he wishes to appeal this Court's order. If the Defendant does not elect to take either of these two steps, the Court will vacate Defendant's existing sentences and impose the aforementioned sentences.

STATEMENT OF FACTS

The Defendant was convicted of two counts of Criminal Sale of a Controlled Substance

in the Third Degree on May 6, 2005 and sentenced to concurrent indeterminate prison terms of 6 ½ to 13 years as a second felony offender. The Defendant's conviction arose from his participation in a sale of crack cocaine in an undercover buy and bust operation in Manhattan.

In addition to his instant offense, Defendant was convicted in 1996 of Attempted Criminal Sale of a Controlled Substance in the Third Degree (a Class C felony). He was given a sentence of 6 months in jail and five years probation on that conviction. He was also convicted in 1998 of Criminal Possession of a Controlled Substance in the Fourth Degree (a Class C felony) for which he received an indeterminate sentence of 3 ½ to 7 years incarceration. Both of these convictions also concerned cocaine. During the pendency of that matter, the Defendant was convicted of the misdemeanor of Criminal Possession of a Controlled Substance in the 7th Degree.

The Defendant was paroled on February 22, 2001 and was subsequently returned to prison on two occasions for parole violations (which did not involve the commission of new crimes). The Defendant was also convicted on March 31, 2005 of the crime of Reckless Endangerment in the Second Degree, a misdemeanor for which he was given a 15 day jail sentence. That crime, according to the People, occurred when the Defendant recklessly drove and crashed a motorcycle. Mr. Jones also has a 1994 youthful offender adjudication for Criminal Sale of a Controlled Substance in the Third Degree.[1]

The People contend that the facts of Defendant's instant offense indicate that the Defendant provided narcotics to another individual who then provided drugs to an undercover

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[1]Defendant's youthful offender adjudication was disclosed in the Defendant's moving papers.

officer. The People also assert that the Defendant had another individual contact the undercover by phone to avoid direct contact with the buyer. This indicates, according to the People, that the Defendant was part of a sophisticated operation and was at a higher level in the illegal narcotics trade than a low-level drug dealer. They also note that the Defendant was apprehended with over $1000 of cash and was participating in a "mobile drug selling operation" by using a car to sell narcotics in the instant matter. The People further assert that the Defendant was apprehended with 73 bags of cocaine in his 1998 conviction.

Mr. Jones has served approximately 5 years and 5 months in prison. During that time, he has been subject to three disciplinary infractions. Disciplinary infractions in the state correctional system are classified in three levels ranging from the least serious infractions, which are classified as Level 1, to the most serious infractions, which are classified as Level 3. In 2006, he failed to report to work and was found sleeping in his cell resulting in a Tier 2 infraction. In 2007, he gave another inmate a dietary supplement the inmate was not permitted to have resulting in a Tier 3 violation. In 2007, he also exchanged supplies with another inmate without authorization resulting in a Tier 2 violation.

During his incarceration, the Defendant has received a GED and completed the Department of Correctional Services Alcohol and Substance Abuse Treatment program (ASAT). He has also participated in job assignments such as Tool Crib Attendant, Maintenance Repairer and Painter and Drywall Installer and Taper. Defendant's counsel, an attorney for the Center for Appellate Litigation, indicates that the Center will assist the Defendant with a variety of re-entry services in the event his instant application is granted and he is released.

With respect to the Defendant's completion of the ASAT program, the People point out

two comments from evaluations the Defendant received in early 2008. In these comments, it was noted that he was doing the "minimum to get by" and had shown more compliance with program responsibilities "only when feet were held to the fire". People's Response to Defendant's Petition, November 13, 2009 ("People's Response") ¶¶ 58, 59.

At the resentencing hearing in this case, the Defendant made a statement in support of his motion. He emphasized that since he had been incarcerated, he had tried to take advantage of programs to assist in his reintegration into society and tried to refrain from negative behavior. He expressed his desire to lead a law-abiding life if released from prison.

CONCLUSIONS OF LAW

The Drug Law Reform Act of 2009, *inter alia,* allows certain convicted Class B felony drug offenders serving indeterminate sentences imposed prior to January 13, 2005 to be resentenced to new determinate terms under the new determinate sentencing parameters of the 2009 DLRA. The statute first requires a court to determine whether a defendant is eligible for resentencing. In this case, the parties agree that the Defendant is statutorily eligibility for resentencing.

The statute then provides that Defendants shall be resentenced pursuant to Penal Law §§ 60.04 & 70.70 unless "substantial justice dictates" that resentencing be denied. CPL 440.46, subdivision (3), referencing § 23 of chapter 738 of the laws of 2004 (the "Drug Law Reform Act of 2004").[2] Upon granting a petitioner's motion for resentencing, the Court must inform the

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[2] The DLRA's standard for determining whether an eligible offender should be resentenced – that such resentencing should be imposed unless "substantial justice dictates" otherwise -- is the same standard which was used in the first Drug Law Reform Act of 2004, which, *inter alia*, authorized resentencing for eligible Class A-1 felony drug offenders. The 2004 standard is incorporated by reference in the 2009 DLRA. The legislative history and case law

petitioner of the proposed new sentence. A petitioner may then withdraw their resentencing application or appeal a court's resentencing determination. If a petitioner takes neither action, the court is required to vacate the Defendant's original sentence and impose the new sentence the Court has offered. In making a determination concerning resentencing, the Court may consider "any facts or circumstances" relevant to the imposition of a new sentence which are submitted by the Defendant or the People and in addition shall consider a defendant's institutional confinement record. Such a review shall include a petitioner's disciplinary history and participation or willingness to participate in correctional treatment or programming. *Id.*

The legislature did not define what the term "substantial justice dictates" means but a number of parameters of the statute are obvious from its language and legislative history. First, where a Defendant is eligible for resentencing, resentencing is not mandatory. Courts rather have a "measure of discretion" in determining whether or not to grant a resentencing application. *People v. Vasquez* 41 AD3d 111 (1st Dept 2007), *lv dismissed*, 9 NY3d 870. It is also obvious that the statute is not neutral in guiding courts as to how to exercise that discretion. Rather, "there is a strong presumption in favor of granting a resentencing application for all eligible defendants". *People v. Lopez* 10 Misc3d 1056(A) (New York County 2005).

In their submission opposing the instant motion, the People surveyed case law in other contexts interpreting the term "substantial justice" and concluded that "the term is used as a synonym for notions of fairness, reasonableness, and due process". People's Response, ¶ 44. This Court agrees with that assessment of the term's meaning. What makes the presumption in favor of resentencing particularly strong under the statute, however, in the Court's view, is the

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interpreting the 2004 law are thus obviously relevant in interpreting the 2009 statute.

use of the word "dictate" in the statute. Blacks Law Dictionary defines this term, *inter alia*, as "[t]o order; to command authoritatively". Black's Law Dictionary, Thomson West Publishing, Eight Edition 2005. Put another way, in order for a court to completely deny resentencing, the facts and circumstances of an offender's instant crime, criminal history, institutional record and other relevant facts must point so strongly against resentencing, when considering notions of fairness, reasonableness and due process, as to authoritatively command that an application be completely denied. Whether that standard is reached in any particular case requires a discretionary determination. But there is no doubt that the bar for the complete denial of a resentencing application under the DLRA is a high one.

The Court must also be mindful of the ameliorative purposes of the 2009 DRLA's resentencing provisions. Those provisions were obviously intended to bring the sentences of appropriate eligible offenders sentenced prior to 2005 in line with the lower sentencing parameters in existence for the same crimes today. This goal is also obviously consistent with the aims the legislature had when it authorized resentencing applications under the 2004 DLRA and a 2005 statute which authorized resentencing for Class A-II felony drug offenders. *See People v. Cintron*, 10 Misc3d 1066(A) (Bronx County 2005); *People v. Greene* 8 Misc3d 1029(A) (Queens County 2005) (discussing the ameliorative purposes of the 2004 DLRA's resentencing provisions); Chapter 643 of the laws of 2005 (authorizing resentencing for certain Class A-II felony offenders).

The high standard for completely denying a resentencing application must be read in conjunction with the fact that a Court has ample discretion in tailoring the precise parameters of a new sentence. A court granting resentencing obviously need not grant an offender the minimum

available term and indeed may choose to offer a defendant any lawful sentence, even one which would result in a higher effective sentence than the one he was already serving.[3] Thus, to the extent equities weigh against granting a Defendant a significantly reduced sentence, those equities may be able to be accommodated by granting an offender a resentence which provides only minimal relief.

The People make a number of arguments here for why "substantial justice dictates" the complete denial of Defendant's motion. They note that the Defendant has participated in numerous drug sales and was on parole for a drug conviction when he was convicted in the instant case. They note that he violated the terms of his parole on three occasions (the two parole violations noted *supra* and his misdemeanor Reckless Endangerment conviction). They also argue that the facts underlying Defendant's instant offense and his criminal history indicate that he was at a higher point in the illegal distribution of narcotics than the lowest of low-level drug dealers. While acknowledging that "one may view the defendant's infractions [while incarcerated] as minor", the People nevertheless assert that his demonstrated inability to consistently conform to Department of Correctional Services rules argues against resentencing. People's Response ¶ 56.

All of the People's arguments, in the Court's view, are relevant considerations here. But the Court does not believe that any of these points indicate that substantial justice dictates the

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[3] A Defendant offered a sentence which effectively required him to serve more time in prison than his existing sentence, obviously, could refuse or appeal that sentence offer. It might also be argued that a Court would not be entitled to avoid the application of the "substantial justice dictates" standard by granting a resentencing application and then offering a new sentence which required a defendant to serve more time in prison than his existing sentence. There is no doubt, however, that a court considering the precise parameters of a resentence possesses broad discretion in arriving at a sentencing number.

complete denial of Defendant's motion. The Court agrees with the People that the Defendant's instant crime likely indicates that he was not at the absolute bottom of the ladder of persons selling illegal narcotics when he was apprehended for his most recent drug offense. But the fact that he may have been at a level in the illegal narcotics trade which was higher than that of an addict selling a $10 rock of crack cocaine does not indicate that substantial justice dictates the denial of his motion. In enacting the DLRA the legislature obviously contemplated that offenders who were more than barely culpable of committing a drug crime might be resentenced. Moreover, while the Defendant may not have been at the absolute bottom of the drug trade, the facts presented to the Court on this motion indicate that he was hardly anything approaching a kingpin or major narcotics trafficker. The Defendant was, obviously, a low-level dealer, a person who directly exposed himself to criminal liability by participating in street level drug sales.

The fact that he was convicted on multiple occasions, moreover, does not mandate the denial of his motion. Second felony drug offenders like the Defendant here are obviously eligible for DLRA resentencing. It was likely in part because of his prior criminal history and the facts of his instant offense that the Defendant received more than the minimum sentence for his instant conviction. All of these facts should be considered in arriving at a resentencing number. But these facts do not indicate that Defendant's motion should be completely denied.

There are two facts, in the Court's view, which, when taken together, strongly argue that Defendant's motion should be granted. The first is that the Defendant has never been convicted of any violent felony or felony which would make him ineligible for merit time. Over the past five years, New York's legislative efforts at reform of the drug laws have consistently targeted "non-violent drug offenders" and have made significant distinctions between offenders with prior

violent (or, with respect to certain sentencing parameters, non-merit time eligible) offenses and offenders who had prior felonies but not prior felonies in these categories.[4]

Defendant's institutional history also includes two important achievements which argue strongly, in the Court's view, that resentencing should be granted. Those achievements are the completion of a GED and the completion of the ASAT program. Defendant's GED means that his chances of leading a law abiding life and finding employment are, in the Court's view, better now then they were before he was incarcerated. Completion of the ASAT program means that he is less likely to be induced by substance abuse to engage in criminal behavior than he was before the program was completed. Both of these steps indicate that the Defendant has made an effort, while incarcerated, to take steps to assist with his lawful reintegration into society. These two programmatic achievements are also integral to the factors the legislature intended courts to focus on in determining resentencing applications. By directing courts to consider a defendant's institutional history and programmatic achievements, the legislature apparently recognized that

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[4] Prior to the 2004 DLRA, an offender with a predicate felony conviction faced an indeterminate sentence of between 4 ½ to 9 years and 12 ½ to 25 years. It was irrelevant whether the prior conviction was for a violent or non-violent felony offense. The 2004 DLRA effectively reduced these terms for predicate offenders with a non-violent felony conviction, imposing determinate sentences of between 3 ½ to 12 years. For offenders with a predicate violent felony conviction, however, the determinate sentencing range became 6 years to 15 years. Factoring in good time credits with respect to determinate sentences, the mandatory minimum sentence for offenders with prior violent felony convictions was *increased* by the 2004 DLRA. *See* Assembly Memorandum in Support of 2004 DLRA at 2 ("[s]entences for drug offenders with prior violent felony convictions could increase modestly" under the statute.) The 2009 DLRA further reduced minimum sentences for predicate felony offenders with prior non-violent felony convictions from 3 ½ years to 2 years and authorized additional sentencing alternatives for these offenders. Sentences for offenders with prior violent felony convictions, however, remained unchanged by the 2009 DLRA and continue to require a mandatory minimum 6 year sentence. Mandatory minimum sentences for non-violent offenders with a predicate violent felony conviction are now 300% higher than those for offenders with a prior non-violent felony offense.

taking steps like completing a drug treatment program or earning a GED may do far more to reduce the likelihood of recidivism among low level non-violent drug offenders and thus far more to enhance public safety than long prison terms.

Any disciplinary infraction while incarcerated, in the Court's view, is potentially serious and must be considered in determining a resentencing motion. But the fact is that in more than five years in prison, the Defendant has been sanctioned three times. None of those sanctions in any way involved violence, drug use or sale, the possession or use of a weapon or the refusal to obey the direct order of a corrections officer. The Defendant slept late and failed to report to work on one occasion, wrongfully gave another inmate a dietary supplement at another time and wrongfully exchanged goods with another inmate on a third occasion. Defendant's comparatively modest disciplinary record provides no basis on which to conclude that his instant application should be denied. Moreover, his last violation was more than two years ago. Defendant's institutional record is also consistent with his criminal history in containing no indicia whatsoever of violence or the possession or use of weapons. Moreover, while Defendant's entire criminal history is relevant in considering the instant application, the most recent salient facts about the Defendant are not his drug sales but his programmatic achievements while incarcerated.

Resentence Calculation

Upon granting an application for resentencing, the Court must offer the Defendant a sentence within the ranges provided by the appropriate provisions of the Penal Law. Here, the Defendant is a second felony drug offender who has been convicted of a Class B felony. Pursuant to the Penal Law, therefore, he is required upon resentencing to receive a determinate

sentence of incarceration between 2 and 12 years followed by a period of post-release supervision with a period of between 1 ½ years and 3 years. Penal Law §§ 60.04; 70.70; 70.45. As noted *supra*, the People oppose Defendant's resentencing motion. In the event the Court has determined to grant Defendant's motion, in addition, the People urge that the maximum sentence be offered to the Defendant, that is, a determinate sentence of 12 years incarceration followed by a period of post-release supervision of 3 years.

Although the DLRA outlines various factors a court should consider in a resentencing application, it does not explicitly instruct courts on how new sentences should be arrived at, how strongly the original sentencing court's determination should weigh in the analysis or how prior and current sentencing ranges should be reconciled. As is true with respect to initial sentences imposed under the Penal Law, a great measure of discretion is afforded to the sentencing court.

In this Court's view, a number of principles, in addition to those which would apply in an initial sentencing determination, should apply in DLRA resentencing calculations. First, the sentence imposed by the original sentencing court should be considered and given great weight in the analysis, particularly where the sentence was imposed, as it was in this case, after a trial. The original sentencing court obviously had much more information about the Defendant and his criminal history than the Court here has been given in determining this motion.

The sentencing court in the instant case gave the Defendant a sentence which exceeded the permissible minimum term by roughly 44%. That is, while the Court could have imposed a minimum indeterminate sentence of 4 ½ to 9 years, it chose to impose an indeterminate sentence of 6 ½ to 13 years. The resentencing provisions of the 2004 DLRA were intended to provide for a "conversion of their [an eligible offender's] sentence to a new term consistent with the

prospective reforms". Assembly Memorandum in Support of 2004 DLRA at 6. The 2009 DLRA obviously has the same design. The fact that the original sentencing court chose to impose a higher term than the minimum sentence argues, in the Court's view, that a higher term than the minimum sentence should also be considered here.

A defendant's institutional adjustment and achievements while incarcerated should also be considered in arriving at a sentence. This is information which the original sentencing court did not have and which the statute explicitly directs the court to consider. It is also the most recent indicia available of the Defendant's behavior and prospects of successfully reintegrating into society. Here, considering Defendant's institutional record as a whole, the Court believes that his comparatively modest disciplinary history and his significant accomplishments in completing the ASAT program and earning a GED provide strong arguments for a sentence in the lower end of the permissible range.

The Court believes it should also consider how much time a defendant has already served and what the practical result of any resentencing number will be. If a Court believes that there is a continuing need for community supervision and that is otherwise roughly consistent with an appropriate sentence, a post-release supervision term can be made to extend past the date of a defendant's release in order to help assure an appropriate transition to the community. Here, the Defendant was incarcerated in the instant matter on July 24, 2004 and has thus served approximately 5 years and 5 months in prison. In this case, the Court believes that some period of post-release supervision would be appropriate. The Court also believes that providing for such a period of post-release supervision would be roughly consistent with the other factors which the Court has determined should be considered here. Under the law the maximum period

of post-release supervision which may be applied in this case is 3 years.

Considering all of these myriad parameters, the Court has determined to offer the Defendant a determinate sentence of 3 ½ years followed by a period of post-release supervision of 3 years with respect to each of the two instant sentences. As was the case with respect to his original sentences, these two new sentences would run concurrently. Defendant's period of incarceration would be credited against both his period of incarceration and his period of post-release supervision. What this means is that if the Court's offered sentence was implemented, the Defendant would be released from prison forthwith and placed on post-release supervision for approximately 13 months before the completion of his combined concurrent sentences of 6 ½ years (3 ½ years of prison followed by three years of post-release supervision).

As outlined above, Defendant on the next adjourned date may either reject the Court's proposed resentences or indicate that he wishes to appeal the Court's proposed resentencing determination. If Defendant does not indicate that he wishes to pursue either of these two avenues, then the Court will proceed to vacate Defendant's existing sentences and impose the new sentences outlined here.

This constitutes the Decision and Order of this Court.

December 10, 2009

Daniel Conviser
A.J.S.C.

HON. DANIEL CONVISER